CE LING SHIPBUILDING SDN BHD

v.

HOE SENG HUAT HARDWARE CO (PTE) LTD

HIGH COURT SABAH & SARAWAK, MIRI
SULAIMAN DAUD J
[SUIT NO: 22-80-2002]
1 JUNE 2003

CIVIL PROCEDURE: *Affidavits - Admissibility - Striking out or expunging affidavits and contents contained therein - Whether affidavits contained exhibits pursuant to negotiations for settlement - Whether plaintiff at liberty to file further affidavits - Whether affidavits and contents contained therein admissible*

COMPANY LAW: *Winding-up - Injunction to restrain petition - Whether debt bona fide disputed - Whether defendant's action time-barred - Balance of convenience and justice of case - Whether in favour of defendant*

The defendant had served the plaintiff with a statutory notice under s. 218 of the Companies Act 1965 demanding payment of the sum of RM3,236,449.15 together with interest thereon, failing which the defendant would commence winding-up proceedings against the plaintiff. The plaintiff applied for an interim injunction to restrain the defendant, its agents or servants from taking any step to wind-up the plaintiff until after the dispute in respect of the alleged debt was adjudicated upon by this court. Before the *inter partes* hearing of the plaintiff's application, the plaintiff filed encl. 27 seeking to expunge certain paragraphs and exhibits in the defendant's affidavit in opposition, while the defendant applied to strike out the plaintiff's affidavit in reply in encl. 37.

Held (dismissing the plaintiff's application):

[1] In respect of encl. 27, it appeared that exh. A1 (a letter from the plaintiff to the defendant) was not written in the course of, or pursuant to, any negotiations for settlement. It was only an initiating letter to open further discussions in regard to the defendant's claim against the plaintiff in the present action. There was nothing in exh. A1 that could be construed as an admission by the plaintiff of the alleged debt. Exhibits A2, A4 and A9 were merely open correspondences related to the s. 218 notice referred to in exh. A1; there was also nothing therein that gave any impression of any negotiation for settlement. Thus, exhs. A1, A2, A4, A9 and the impugned paragraphs were admissible for the purpose of the *inter partes* application. (p 150 d-g)

[1a] In respect of encl. 37, the matters deposed in the affidavit in reply were mainly the plaintiff's response to the defendant's affidavit in opposition. The plaintiff was at liberty to file further affidavits in reply to the defendant's affidavit opposing the application and to put its own version of any matter or allegation raised therein. Otherwise, the plaintiff would be deemed to have admitted all the positive assertions in the defendant's affidavit. (p 152 b-c)

[2] On the facts, there was an acknowledgement by the plaintiff of its indebtedness to the defendant about the sum claimed. This finding was further fortified by the fact that the plaintiff had made three payments after the date specified for making the full payment. (p 155 f & h)

[2a] There was also no merit in the plaintiff's alternative argument that the defendant's claim was time-barred since the plaintiff itself admitted making part payment, and by virtue of s. 20(1) of the Limitation Ordinance (Cap 49) (Sarawak), part payment has the effect of renewing the limitation period, commencing from the time the payment was made. Hence, the defendant's action in serving the said statutory notice was well within the limitation period for the recovery of the said debt. (p 156 a-b)

[2b] Since the plaintiff had admitted the debt and the amount so unpaid was substantial, the defendant should not, at this stage, be prevented from pursuing the intended winding-up proceedings against the plaintiff. On the balance of convenience or justice of the case, the harm that would result from the injunction being granted outweighed that of it being refused. (p 156 c-d)

[Enclosures 27 and 37 dismissed; plaintiff's application dismissed.]

Case(s) referred to:

Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5 SC ***(refd)***

Damanyanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors [2001] 6 MLJ 417 ***(dist)***

Datuk Abu Mansor Mohamad Nasir v. Bank Kerjasama Rakyat Malaysia Bhd & Anor [1982] CLJ 238; [1982] CLJ (Rep) 69 FC ***(dist)***

Dusun Desaru Sdn Bhd & Anor v. Wang Ah Yu & Ors [2000] 6 CLJ 469 HC ***(refd)***

Imbangan Utama Sdn Bhd v. Lotan Engineering [2002] 2 MLJ 313 ***(refd)***

Oh Kuang Liang v. Associated Wood Industries Sdn Bhd [1995] 2 CLJ 961 HC ***(refd)***

Platinum Heights Sdn Bhd v. Sun Mix Concrete Sdn Bhd [1997] 1 MLJ 409 ***(refd)***

Re Daintrey, ex p Holt [1893] 2 QB 116 ***(refd)***
RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd [2002] 3 CLJ 83 CA ***(foll)***
Rush & Tompkins Ltd v. Greater London Council [1988] 3 All ER 737 ***(refd)***
South Shropshire DC v. Amos [1987] 1 All ER 340 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218
Evidence Act 1950, s. 23
Limitation Ordinance (Cap 49) (Sarawak), s. 20(1)
Rules of the High Court 1980, O. 41 r. 6

Evidence Act [Ind], s. 23

Other source(s) referred to:
Sarkar's Law of Evidence, 14th edn, p 358

For the plaintiff - Idris Abdullah; M/s Idris & Co
For the defendant - Abdul Rahman; M/s Battenberg & Talma

Reported by Suresh Nathan

JUDGMENT

Sulaiman Daud J:
By summons in chambers dated 20 December 2002 the plaintiff applied for an *ex parte* interim injunction to restrain the defendant, his agents or servants from taking any step whatsoever to wind up the plaintiff until after the dispute in respect of the alleged debt to which the present suit relates is adjudicated by this court. The *ex parte* application was heard on 23 December 2002 whereby the court granted the said injunctionary relief sought and fixed 13 January 2003 for the hearing of the *inter partes* application.

Preliminary Issues
Before the *inter partes* hearing, both the plaintiff and the defendant filed in separate applications, in encl. 27 and 37 respectively, to expunge certain paragraphs and exhibits in the plaintiff's and defendant's affidavit, as the case may be.

Enclosure 27
In encl. 27 the plaintiff seeks to expunge from the defendant's affidavit in opposition affirmed by Leslie Chua Peng Heng on 8 January 2003 (encl. 23) the following paragraphs and exhibits, namely:

(a) paragraphs 6(e), 6(f), 6(i), 6(j), 6(k), 6(1), 14(c)(iii), 29(a), 29(b), 29(c), 30(a), 30(b), 31, 32, 32(a), 32(b), 32(c), 32(d), 32(e), 33, 35, 35(a), 35(b), 35(c), 36 and 38(b); and

(b) exhibits A1, A2, A4 and A9.

All the paragraphs and exhibits sought to be expunged herein made reference to or was related directly or indirectly to exh. Al of encl. 23, being a letter from the plaintiff to the defendant with an endorsement "without prejudice". The said letter read as follows:

Date: 16 December 2002

M/s Hoe Seng Huat Hardware Co (Pte) Ltd.
No 55, Lavender Street, **WITHOUT PREJUDICE**
Singapore, 338713,
Tel: (65) 2929292
Fax: (65) 2828282

Kind Atten: Mr. William Lim

Re: Account with Hoe Seng Huat Hardware Co. (Pte) Ltd.

We refer to the teleconversation between your Mr. William Lim and our Mr. Ling Chu Ek on 16 December, 2002 in respect of the above mentioned matter.

As discussed and agreed upon, your company shall instruct your solicitors, Messrs. Battenberg & Talma, Miri to postpone the Statutory Notice of Demand dated 4th of December, 2002 pursuant to s. 218(2)(a) of the Companies Act, 1965 against our company. Our Mr. Ling Chu Ek will meet with your Mr. William Lim on or before the 3rd January 2003 in Singapore to discuss the matter.

We would appreciate if you could kindly acknowledge receipt by signing and returning to us duplicate hereof.

Thank you.

Your faithfully,
On behalf of Mr. Ling Chu Ek

Signed
MR. TING PANG WON
GENERAL MANAGER.

Mr. Idris Abdullah, for the plaintiff, referred the court to s. 23 of the Evidence Act 1950 and O. 41 r. 6 of the Rules of the High Court 1980 ("the RHC"). The said s. 23 provides as follows:

> In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under the circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

The said O. 41 r. 6 empowers the court to order the striking out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive. On the application of the said s. 23, the learned counsel also referred the court to *Sarkar's Law of Evidence*, 14th edn, at p. 358, on its commentary on s. 23 of the Indian Evidence Act (which is in *pari materia* with the said s. 23) which states that 'confidential overtures of pacification, and any other offers or propositions between litigating parties, expressly or impliedly made without prejudice, are excluded on ground of public policy'.

The learned counsel also cited several authorities which deal with the issue of without prejudice negotiation, including *Rush & Tompkins Ltd v. Greater London Council* [1988] 3 All ER 737 and *Oh Kuang Liang v. Associated Wood Industries Sdn Bhd* [1995] 2 CLJ 961; ([1995] CLJ JT(18)). Based on the foresaid authorities it is submitted that the without prejudice rule applies to the plaintiff's letter in exh. Al, and to all the said paragraphs and exhibits wherein the said exh. A1 was referred to.

Mr. Abdul Rahman, for the defendant, advanced several grounds in opposing the application. The learned counsel pointed out that the plaintiff during the ex parte and the present *inter partes* application had firstly introduced a "without prejudice" document, exh. "T10", in the affidavit of Ting Pang Won affirmed on 2 January 2003 (encl. 1). By reason thereof it is submitted that the plaintiff has waived its veil of privilege when it first introduce the letter exh. "T10". In support of the contention the learned counsel relied on *Dusun Desaru Sdn. Bhd. & Anor v. Wang Ah Yu & Ors* [2000] 6 CLJ 469 where it was held that there was thus a waiver on the part of the plaintiff of the privilege shield when the plaintiff itself first introduced the 'without prejudice' letter.

It is also his contention that exh. "A1" was not made in the course of negotiations for settlement but is merely an agreement between the parties to meet in Singapore on or before 3 January 2003 to 'discuss this matter'. According to the learned counsel the exh. A1 is only an initiating letter following a telephone conversation made between the plaintiff's representative and the defendant.

a It is settled law that the heading "without prejudice" does not conclusively or automatically render a document so marked privileged, and if privilege is claimed but challenged, the court can look at the document so headed in order to determine its nature (per Parker LJ in *South Shropshire DC v. Amos* [1987] 1 All ER 340 at p. 344). The decision in *South Shropshire DC* reaffirms the b principle laid down by Vaughan Williams J in *Re Daintrey, ex p Holt* [1893] 2 QB 116 where, at p. 119, his Lordship said:

> In our opinion the rule which excludes documents marked 'without prejudice' has no application unless some person is in dispute or negotiation with another, and terms are offered for settlement of the dispute or negotiation, c and it seems to us that the judge must necessarily be entitled to look at the document in order to determine whether the conditions, under which alone the rule applies, exist.

In the instant case it appears to me that exh. A1 was not written by the plaintiff to the defendant in the course of or pursuant to any negotiation for settlement. d It merely put on record the agreement on the part of the defendant to postpone the service of the statutory notice of demand to the plaintiff and that the parties will meet in Singapore on or before 3 January 2003 'to discuss the matter'. I therefore agree with Mr. Abdul Raman that exh. A1 is only an initiating letter to open further discussion on the defendant's claim against the plaintiff in the e present action.

It is also obvious that there is nothing in exh. A1 which can be construed as an admission by the plaintiff of the alleged debt to which the s. 218 notice relates. Having perused through exhs. A2, A4 and A9 introduced by the defendants, I am also satisfied that the said letters were merely open f correspondence related to the s. 218 notice referred to in exh. A1, and there is also nothing therein to give any impression of any negotiations for settlement.

On this ground alone I hold that exhs. A1, A2, A4 and A9 are admissible for the purpose of the *inter partes* application. With regard to the impugned g paragraphs, it is apparent that the challenge to their admissibility is grounded on the fact that the same made reference to exhs. A1, A2, A4 and A9. In view of my finding on the admissibility of the said exhibits, I will likewise hold that the statement in the impugned paragraphs is also admissible.

Accordingly, I dismiss the plaintiff's application in encl. 27 with costs to be h taxed unless otherwise agreed.

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Enclosure 37

By summons in chambers in encl. 37 the defendant applied to strike out or expunge from the records the affidavit in reply of Ling Chu Ek affirmed on 13 January 2003 (encl. 29). The said affidavit was filed by the plaintiff in response to the affidavit of one Leslie Chua Peng Heng (encl. 23) filed by the defendant to oppose the *inter partes* application.

Mr. Abdul Rahman contended that the said affidavit contained statements and referred to matters which were not introduced during the *ex parte* application for injunction or at the *inter partes* stage. According to the learned counsel the matters contained in the said affidavit are fresh and new evidence which were not before the court at the *ex parte* hearing. It is submitted that such evidence cannot be introduced for the purpose of the *inter partes* application to remedy the error made in the *ex parte* application.

Further it is submitted that the matters deposed by the plaintiff in the said affidavit have the effect of bolstering the plaintiff's case at the *inter partes* stage and is not allowed in an *inter partes* application for injunction. In support of the proposition the learned counsel relied on the decision of the Federal Court in *Datuk Abu Mansor bin Mohamad Nasir v. Bank Kerjasama Rakyat Malaysia Bhd & Anor* [1982] CLJ 238; [1982] CLJ (Rep) 69, and the case of *Damanyanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors* [2001] 6 MLJ 417.

Mr Idris, on the other hand, pointed out that the defendant has not filed any application to set aside the *ex parte* order but the same has ceased through effluxion of time. He argued that in the absence of any challenge to the *ex parte* order, the defendant cannot now at the *inter partes* hearing complain of non disclosure because that argument would only be relevant in an application to set aside the *ex parte* order.

On this point the learned counsel referred to the case *RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd* [2002] 3 CLJ 83 where Abdul Hamid Mohamad JCA said:

> It must be pointed out that the ad interim injunction is not an extension of the *ex parte* order which expires after 21 days. It is a fresh order made on the converted *inter partes* application now before the court. And, when the court finally hears the application, *inter partes*, the court will then decide whether or not to grant an injunction, *inter partes*. That will be a fresh order again.

Based on the observation aforesaid it is the learned counsel's contention that when the court hears an application *inter partes*, both parties are given the opportunity to canvass their cases. He pointed out the averment contained in the impugned affidavit is nothing more than a reply to the defendant's affidavit in opposition for the *inter partes* hearing.

Having perused through the said affidavit, I agree with the learned counsel that the matters deposed therein are mainly the plaintiff's reply to the defendant's affidavit in opposition. The question is whether at the *inter partes* hearing the plaintiff can file in further affidavits in reply to the defendant's affidavit opposing the application. In my opinion the plaintiff is at liberty to make such reply and to put its own version to any matters or allegation raised therein otherwise the plaintiff would be deemed to have admitted all the positive assertions in the defendant's affidavit. Further as stated by Abdul Hamid Mohamad JCA in *RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd* '... when the court hears the application, *inter partes*, the issue is whether the court should or should not grant a fresh injunction, *inter partes*. The court is not considering whether or not to extend the *ex parte* order, ...

Both cases *Datuk Abu Mansor bin Mohamad Nasir v. Bank Kerjasama Rakyat Malaysia Bhd & Anor* and *Damanyanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Ors* referred to by the learned counsel for the defendant can be distinguished as these cases are concerned with an application to set aside an *ex parte* injunction. For all the reasons stated above I also dismiss the defendant's summons in encl. 37.

Having dealt with the preliminary issues on the admissibility of the parties' affidavits, I now turn to consider the main application in encl. 1.

The facts and circumstances giving rise to this application can be briefly stated. The defendant had by a letter dated 4 December 2002 through its advocates served on the plaintiff a statutory notice under s. 218 of the Companies Act 1965 demanding the payment of the sum of S$1,486,655.56 (equivalent to Ringgit Malaysia RM3,236,449.15) together with interest thereon, failing which the defendant will commence a winding up proceedings against the plaintiff.

On 23 December 2002 this court has granted an *ex parte* interim injunction against the defendant whereby it was ordered, among others, that the defendant or its agents or servants be restrained from taking any steps whatsoever to wind up the plaintiff until the adjudication of the dispute on the alleged debt claimed by the defendant against the plaintiff.

Mr. Idris advanced several grounds in support of the relief sought by the plaintiff, which can be summarised as follows:

(a) firstly the defendant does not have the *locus standi* to bring about any winding up petition as the plaintiff's claim is a disputed debt;

(b) secondly there are serious question to be tried.

(c) thirdly if the defendant is allowed to proceed with the winding up petition the plaintiff would suffer damages which could not be recompensated;

(d) fourthly the balance of convenience lies in favour of the plaintiff.

Mr. Abdul Rahman, for the defendant, on the other hand contended that the defendant is a *bona fide* petitioner. He submitted that there is no dispute or even serious question to be tried as it is clearly unambiguous that the plaintiff had admitted the debt and the sum owing. He denied that the debt is at large or time barred as asserted by the plaintiff.

As a general rule a winding up court should not be used as a machinery for trying a common law action in determining a disputed debt. However if it is clear that such debt is due and the same is not disputed, the person to whom it is owing cannot be restrained from issuing a winding up petition against the person from whom it is payable.

In the Supreme Court case of *Chip Yew Brick Works Sdn Bhd v. Chang Heer Enterprise Sdn Bhd* [1988] 2 CLJ 424; [1988] 1 CLJ (Rep) 5, the appellant had served a notice on the respondent's company demanding payment of RM127,159 and notifying that action for the winding up of the company would be taken in the event that payment was not made within the stated time. No payment was made and the appellant filed a petition for winding up. It was held that since the amount of the debt admitted and unpaid was substantial the appellant should not be prevented from pursuing its petiton so that the court would be able to consider all the evidence and determine whether it should exercise its discretion to order winding up or not. Similarly in *Platinum Heights Sdn Bhd v. Sun Mix Concrete Sdn Bhd* [1997] 1 MLJ 409, the court dismissed the plaintiff's originating summons for an injunction to restrain the defendant from presenting a winding up petition against the plaintiff as there was no dispute to the debt. (See also *Imbangan Utama Sdn Bhd v. Lotan Engineering Sdn Bhd* [2002] 2 MLJ 313).

Based on the aforesaid authorities it appears to me that the defendant will only have the *locus standi* to commence the intended winding up petition against the plaintiff if there is an acknowledgement of indebtedness by the plaintiff on the sum claimed by the defendant under the statutory notice. Mr. Abdul Rahman contended that the debt is due and payable as evidenced from the 13 invoices exhibited and marked A5(1) to A5(15) in the defendant's affidavit in opposition (encl. 23). He also pointed out that the plaintiff himself had, in para. 8(a) to (d) of its affidavit in support (encl. 1), admitted the said debt.

For the purpose of determining whether or not there was an admission of such debt in the said para. 8, I find it convenient to reproduce the same, which read:

> 8. The plaintiff denies being indebted to the defendant as alleged and avers that instead, the defendant is fully aware of the fact that:
>
> (a) the goods purchased by the plaintiff was for the purpose of building *inter alia* a barge for one of the plaintiff's customers;
>
> (b) due to the recent Asian Economic Crisis, the plaintiff's customer who ordered the barge from the plaintiff went into financial difficulties and failed to pay the plaintiff for the said barge and as such could not take delivery of the said barge.
>
> (c) payment of goods purchased was to come from the proceeds of sale of the barge to the plaintiff's said customer;
>
> (d) as the plaintiff's customer failed to pay the plaintiff for building the barge, the plaintiff could not be expected to pay the defendant for the goods purchased;
>
> (e) subsequently, by way of a letter dated 12/09/98 from the defendant to the plaintiff, the defendant agreed to settlement of the monies for the said goods sold and delivered by:
>
> (i) the plaintiff settling the amount of S$l,548,655.56 outstanding by 31/12/1998; and
>
> (ii) in the event that the plaintiff is not able to settle this amount fully in cash, any remaining balance shall be settled by the delivery of barges of the quantities and standard acceptable by the defendant and equivalent to a value not lower that the remaining balance by 31/12/1998.
>
> [The said letter was exhibited as "T-3" referred therein]

(f) the plaintiff had before 3/12/1998 offered to deliver a barge to the defendant to settle the remaining balance but the defendant had inexplicably failed and refused to accept delivery of the same.

(g) instead, the defendant had a change of mind and preferred to be paid monetary terms instead of taking a barge from the plaintiff as agreed in the plaintiff's letter of 12/09/1998.

(h) given the good relationship between the plaintiff and the defendant, the plaintiff had from time to time and as when the plaintiff was able to do so, remitted some payment to the defendant. The defendant had on each occasion unconditionally and without complaint accepted various payments by the plaintiff.

Particulars of Payment

(1) 30/07/1999	CELE/M/07/99/136	RM4,557.65
(2) 10/06/2000	UOBL318515	RM23,200.00
(3) 02/11/2000	UOBL318519	RM23,200.00

Based on the defendant's agreement to take barges to settle the remaining balance owing as averred aforesaid, and by reason of the defendant's conduct in accepting payment unconditionally from time to time from the plaintiff, Mr. Idris argued that the time for payment of the said debt by the plaintiff to the defendant became at large.

It is without doubt from the aforesaid averment that there is an acknowledgement by the plaintiff of its indebtedness to the defendant on the sum claimed. It also appears to me that the assertion by the plaintiff that it has offered to settle the sum owing by the delivery of a barge was not supported by any evidence. There was also no evidence led to show the value of the barge so offered, or whether it was of the standard acceptable to the defendant, if at all there was such an offer. The fact that the defendant has given the option to the plaintiff to settle the sum owing in kind by certain date cannot in my view make the time for payment to be at large as submitted. To hold otherwise would in my view render the contract between the parties to be void for uncertainty. The defendant will not be in a position to know when its cause of action will commence for the recovery of the said debt.

My finding on the admission of the said debt by the plaintiff is further fortified by the fact that it has made three payments after the date specified in T3 for making the full payment. The unconditional acceptance by the defendant of such payment will not in my opinion render 'the time for payment to be at large', even if there is such a legal maxim.

There is also no merit in the learned counsel's alternative argument that the defendant's claim is time barred. In fact such a contention is obviously in contradiction to his earlier argument that the time for payment is at large. If the time for payment is at large as submitted there is no way for limitation to set in. Be that as it may, it is expressly provided in s. 20(1) of the Sarawak Limitation Ordinance that part payment has the effect of renewing the limitation period, which new period commences from the time the payment was made. In the instant case the plaintiff itself admitted making such part payment, the last of which was made on 2 November 2000. By reason thereof I hold that the defendant's action in serving the said statutory notice is well within the limitation period for the recovery of the said debt.

Having considered that the plaintiff has admitted the debt and the amount so unpaid was substantial, I am of the view that the defendant should not at this stage be prevented from pursuing the intended winding up proceedings against the plaintiff.

On the balance of convenience or justice of the case, I am of the view that the harm from the grant of the injunction sought outweighed the harm that would result in the refusal thereof. If the injunction is granted the defendant will be deprived of its right from pursuing his legal remedy approved by law. As for the plaintiff, it can still challenge and resist the intended winding up in the winding up court. Accordingly I dismiss the plaintiff's application herein with costs to be taxed unless otherwise agreed.